

**LAW OFFICES OF MARC J. WODIN**

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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

PAMELA THOMPSON, Individually )  
and as Personal )  
Representative of CHARLES )  
THOMPSON, Deceased, )  
Plaintiff, )  
vs. )  
CONSECO SENIOR HEALTH )  
INSURANCE COMPANY, a )  
Pennsylvania corporation, )  
DOES 1 through XX )  
Defendant(s). )

CASE NO.: C 07-05437 PJH  
[Sonoma County Superior  
Court Case No. 241544]

**RE-NOTICE OF MOTION TO  
DISMISS PURSUANT TO FRCP  
12(b)(6), AND TO STRIKE  
PURSUANT TO FRCP 12(f);  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

**DATE: December 19, 2007  
TIME: 10:00 a.m.  
CTRM: 3,17<sup>th</sup> Floor**

Assigned to: The Honorable  
Phyllis J. Hamilton

**TO: THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
CALIFORNIA AND TO THE INTERESTED PARTIES AND THEIR ATTORNEYS OF  
RECORD:**

Please take notice that on December 19, 2007, at 10:00 a.m.  
in Courtroom 3, 17<sup>th</sup> Floor, of the above entitled court located  
at the U.S. Courthouse, 450 Golden Gate Avenue, San Francisco,  
California, defendant Conseco Senior Health Insurance Company  
("defendant") will move the court for an order dismissing Pamela  
Thompson, insofar as she is suing in her own capacity, on the

1 first cause for breach of contract, the second cause for bad  
2 faith, and the third for violation of Welfare and Institutions  
3 Code §§15600.

4 Said motion will be made pursuant to FRCP 12(b)(6), on the  
5 ground that said causes, and each of them, do not state a claim  
6 on which relief can be granted, in that Pamela Thompson does not  
7 have standing to sue in her own capacity.

8 Additionally, defendant will move the court for an order  
9 either dismissing the first cause of action for breach of  
10 contract pursuant to FRCP 12(b)(6), or striking the following  
11 portions of the complaint, and each of them: Paragraph 12 of the  
12 first cause of action for breach of contract: "The acts of  
13 Defendants alleged in Paragraph 8, supra, were done maliciously  
14 and oppressively and with the intent of defrauding Plaintiff.  
15 Plaintiff is therefore entitled to exemplary or punitive  
16 damages." Prayer, item 3 "For punitive damages" (insofar as it  
17 relates to the first cause of action for breach of contract).

18 Said motion will be made pursuant to FRCP 12(f), on the  
19 ground that punitive damages are not recoverable on a cause for  
20 breach of contract.

21 Additionally, defendant will move the court for an order  
22 either dismissing the second cause of action for bad faith and  
23 the third cause of action for violation of Welfare and  
24 Institutions Code §§15600 pursuant to FRCP 12(b)(6), or striking  
25 the following portions of the complaint, and each of them:  
26 Paragraph 15 of the second cause of action for bad faith: "As a  
27 direct and proximate result of the actions of the Defendants, and  
28 each of them, Plaintiff has suffered emotional distress. . ."

1 Paragraph 19: As a proximate result of said violations. . .  
2 Charles Thompson. . .suffered emotional distress. . ."

3 Said motion will be made pursuant to FRCP 12(f), on the  
4 ground that Charles Thompson is deceased, damages for emotional  
5 distress do not survive death, and a personal representative or  
6 successor interest of the decedent cannot recover damages for  
7 the decedent's emotional distress in an action brought after the  
8 decedent's death.

9 Said motion will be based on this notice, the pleadings,  
10 records and documents on file in this action, the memorandum of  
11 points and authorities served and filed herewith, as well as such  
12 oral and documentary evidence as may be presented at the time of  
13 the hearing of the motion.

14  
15 DATED: November 6, 2007

LAW OFFICES OF MARC J. WODIN

16  
17 By           /S/ Marc J. Wodin            
18 MARC J. WODIN  
19 Attorneys for Defendants CONSECO  
20 SENIOR HEALTH INSURANCE COMPANY,  
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**MEMORANDUM OF POINTS AND AUTHORITIES****1. Introduction**

Plaintiff Pamela Thompson, suing in her own capacity, and as a representative of Charles Thompson, deceased, alleges that: Charles Thompson was insured under a Long Term Care Insurance Policy issued by Transport Life Insurance Company, which was assumed by defendant Conseco Senior Health Insurance Company ("defendant"). (Cmplt., para 5 and Exhibit A to Cmplt.) On or about April 2005, Charles Thompson became entitled to benefits under the policy. (Cmplt. para. 6) Defendant wrongfully denied benefits. (Cmplt. para. 7) Charles Thompson died on June 8, 2007. Pamela Thompson is his successor in interest. (Cmplt. para. 10)

Plaintiff alleges that this conduct constituted a breach of the insurance contract (first cause), bad faith (second cause) and a violation of Welfare and Institutions Code §§15600 et. seq.(the causes)

Pamela Thompson is seeking to sue, on all three causes, not only as a successor in interest of Charles Thompson, but also in her own capacity, alleging that this conduct constituted a wrong to her, and entitles her to damages. (Cmplt. paras. 1-19 and prayer) She has no standing to bring the action, on her own behalf.

Further, on the first cause for breach of contract, plaintiff seeks recovery of punitive damages on behalf of Charles Thompson. (Cmplt. para. 12.) Punitive damages are not recoverable on a cause for breach of contract.

Further, on the second cause for bad faith, and the third cause for violation of Welfare and Institutions Code §§15600 et.

seq., plaintiff seeks recovery of damages for emotional distress on behalf of Charles Thompson - i.e. damages for emotional distress which Charles Thompson allegedly suffered prior to his death. (Cmplt. paras. 15, 19) Damages for emotional distress do not survive death, and a personal representative or successor interest of the decedent cannot recover damages for the decedent's emotional distress in an action brought after the decedent's death.

**2. Pamela Thompson has no standing to sue in her own capacity, only as a representative of Charles Thompson.**

A non-party to an insurance contract, has no standing to enforce it or recover extra-contractual damages, for the wrongful withholding of benefits. Seretti v. Superior National Insurance Co. (1999) 71 Cal.App. 4<sup>th</sup> 920, 930 ("[S]omeone who is not a party to the contract has no standing to enforce it or recover extra-contractual damages for the wrongful withholding of benefits" - affirming an order sustaining defendants' demurrer, where a person, who was not a party to the insurance contract, sought to sue the insurer in contract and tort for wrongful denial of benefits). See also Jones v. Aetna Casualty and Surety Co. (1994) 26 Cal.App. 4<sup>th</sup> 1717, 1722 (same); Hatchwell v. Blue Shield of California (1988) 198 Cal.App. 3d 1027, 1034 (same) <sup>1</sup>

Pamela Thompson is not a party to the insurance contract.

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<sup>1</sup> Further, "a non-party who is nevertheless entitled to policy benefits, such as an insured person under the terms of the policy, or an express beneficiary, has standing only if he or she is the *claimant* whose benefits are wrongfully withheld." Siretti, supra, p. 930, and Jones, supra, p. 1722, citing Hatchwell, supra

1 She has no standing to bring this action in her own capacity.

2  
3 **3. Plaintiff cannot recover punitive damages on the first**  
4 **cause for breach of contract.**

5 Punitive damages are not recoverable on a cause for breach  
6 of contract, even if the defendant's breach was willful or  
7 fraudulent. Dryden v. Tri-Valley Growers (1977) 65 Cal.App. 3d  
8 990, 999 ("It is well settled in this state that punitive damages  
9 may not be awarded based on breach of contract, even though the  
10 defendant's breach was willful or fraudulent.") See also Vale v.  
11 Union Bank (1979) 88 Cal.App. 3d 330, 339 (trial court "correctly  
12 ruled that punitive damages are not recoverable for breach of  
13 contract."); Hoffmayer v. Dean Witter & Co. 459 F. Supp. 733, 740  
14 (N.D.Cal. 1978) ("California does not permit recovery of punitive  
15 damages in a contract action.")

16 Plaintiff's claim for punitive damages on the cause for  
17 breach of contract should be stricken.

18 **4. There can be no recovery of damages from Charles**  
19 **Thompson's emotional distress. Such damages did not survive his**  
20 **death.**

21 Damages for emotional distress do not survive death, and a  
22 personal representative or successor interest of the decedent  
23 cannot recover damages for the decedent's emotional distress in  
24 an action brought after the decedent's death. Code of Civil  
25 Procedure §377.34 ("In an action. . . by a decedent's personal  
26 representative or successor in interest on the decedent's cause  
27 of action, the damages recoverable. . . do not include damages  
28 for pain, suffering or disfigurement.") See also Maddox v.

1 Philadelphia Life Insurance Company 77 F. Supp. 2d 1123, 1134  
2 ("Plaintiff's recovery of emotional distress damages is expressly  
3 barred by California's survival statute [i.e. Code of Civil  
4 Procedure §377.34, previously Code of Civil Procedure §573]  
5 Plaintiff's present no authority to overcome the long-established  
6 rule that emotional distress damages are within the definition of  
7 pain and suffering damages and do not survive the death of a  
8 decedent under the California survival statute."); Neal v.  
9 Farmers Insurance Exchange (1978) 21 Cal.3d 910, 920 ("The trial  
10 court properly ruled that because Mrs. Neal had died prior to  
11 trial, no damages for emotional distress were recoverable.)

12 The claim for damages for emotional distress on the second  
13 cause for bad faith, and the third cause for violation of Welfare  
14 and Institutions Code §§15600, et seq. should be stricken.

15  
16 DATED: November 6, 2007

LAW OFFICES OF MARC J. WODIN

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18  
19 By           /s/ Marc J. Wodin            
20 MARC J. WODIN  
21 Attorneys for Defendant CONSECO  
22 SENIOR HEALTH INSURANCE COMPANY  
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